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Supreme Court, U.S.
FILED

No. 02-55 MAY 24 2002

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term 2001

RICHARD DENNIS and PENELOPE DENNIS
Petitioners

v.

CITY OF EASTON and EASTON
BOARD OF HEALTH
Respondents

On Petition for Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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115 pg

TABLE OF CONTENTS

	PAGE
Order of Supreme Court of Pennsylvania dated March 1, 2002, per curiam.....	1a
Order & Opinion of Commonwealth Court of Pennsylvania dated 6/28/01 per Leadbetter, J.....	2a
Order & Opinion of Court of Common Pleas of Northampton County dated 9/27/00 per Freedberg, J.....	14a
Order & Memorandum of United States District Court Eastern District of Pa per Troutman, SJ dated 1/22/96.....	31a
Affidavit of Penelope Dennis.....	78a

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

RICHARD DENNIS And PENELOPE DENNIS	: 575 M.D. Alloc. Dkt. 2001 : : Petition for Allowance of Appeal From
Petitioners	: the Commonwealth Court
v.	:
CITY OF EASTON And EASTON BOARD OF HEALTH:	: :
Respondent	

ORDER

PER CURIAM:

AND NOW, this 1st day of March, 2002, the Petition For Allowance of Appeal is denied.

Attest: Mar – 1 2002

IREME M. BIZZOSO, ESQUIRE
DEPUTY PROTHONOTARY

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Dennis and Penelope Dennis:		
Appellants	:	NO. 2322 C.D. 2000
v.	:	
City of Easton and Easton Board	:	
Board of Health	:	

ORDER

AND NOW, this 28th day of June, 2001, the order of the Court of Common Pleas of Northampton County in the above captioned matter is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER, Judge
June 28, 2001

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Richard Dennis and Penelope Dennis:		
Appellants	:	NO. 2322 C.D. 2000
v.	:	
City of Easton and Easton Board	:	Argued: June 4, 2001
Board of Health	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE JOSEPH F. MCCLOSKEY, S.J.

OPINIONS NOT REPORT

MEMORANDUM OPINION BY JUDGE LEADBETTER
FILED: June 28, 2001

Richard and Penelope Dennis appeal from the entry of summary judgment in favor of the City of Easton (City) and the Easton Board of Health (Board) in the Dennises' action stemming from the 1994 closure of the neighborhood convenience store they owned and operated. The Court of Common Pleas of Northampton County granted summary judgment because federal due process and equal protection claims were collaterally estopped and, inasmuch as the Dennises no longer own the store, judicial review of the Board's decision to close the store is moot. We affirm.

On December 11, 1991, the City Sanatarian, Edward Ferraro, inspected the Dennis store. Based on his inspection, Ferraro issued a notice directing the Dennises to correct

numerous conditions on the premises that violated the City's Health Code. The Denises did not dispute the existence of the conditions listed on the violation notice by an appeal to the Board of Health. During the following two and one-half years, Ferraro endeavored, by sending warning letters, conducting re-inspections and meeting with the Dennises, to have the violations corrected. On May 17, 1994, Ferraro closed the store by posting the premises and delivering a letter to the Dennises listing the still uncorrected violations. The Dennises timely requested a review hearing before the Board of Health pursuant to §1191.11 of the City Health Code.[1]

[1] Section 1191.11(a) of the Easton City Health Code provides (a) Any person aggrieved by a notice may request and shall be granted a hearing in the manner provided in this section. The person requesting a hearing shall, within ten days from the day the notice was served, file in the Office of the Secretary of the Board a petition for a hearing on forms provided by the Board. The Secretary of the Board shall immediately refer the petition to the Board which shall give the petitioner written notice thereof. The hearing shall be held before the Board not more than thirty days from the day the petition was filed. The petitioner shall have the right to appear at the hearing in person or to be represented by an attorney or by any other person..

On June 30, 1994, following a hearing, the Board sustained the closure of the store. The Dennises did not appeal the Board's decision. They filed a complaint for damages in common pleas

claiming that the "arbitrary and capricious" closure of their store was in violation of federal constitutional guarantees of due process, and equal protection.[2] The City and Board removed this action to the Untied States District Court for the Eastern District Of Pennsylvania, where the matter underwent compulsory arbitration. After the arbitrators entered their award for defendants, the Dennises requested *de novo* review by the district court. The district court granted summary judgment in favor of defendants on the claims for violations of procedural due process and equal protection. On the claim that the City acted arbitrarily and

[2] The first complaint was filed under Northampton County docket no. 1994-C-5915.

capriciously in closing the store, the court concluded that it "would essentially be conducting an appellate review of the Board of Health's determination", an exercise it was not authorized to perform. For this reason, the court dismissed that claim without prejudice. *Dennis v. City of Easton,* (E.D.Pa., No. 94-CV-50731, filed January 24, 1996). The United States Court of Appeals for the Third Circuit affirmed without opinion.

Shortly thereafter, the Dennises filed a second complaint in common pleas seeking to have the closure "set aside and reviewed" and requesting damages for "pain, suffering, mental anxiety, embarrassment and humiliation" and "loss of their livelihood" resulting from arbitrary and capricious closure of the store. On the City's motion for summary judgment, common pleas concluded that the decision of the district court collaterally estopped claims based on violations of procedural due process and equal

protection in connection with the store closure. Therefore, common pleas entered partial summary judgment in favor of the City on the Dennises' claim for damages. As to the claim for review of the Board's decision sustaining closure of the store, common pleas determined that, inasmuch as no stenographic record had been made of the hearing before the Board on June 30, 1994, the matter must be remanded pursuant to Local Agency Law, 2 Pa. C.S. §§751-754[3] so that a full and complete record can be made and stenographically recorded concerning the basis for closing the plaintiff's store.' *Dennis v. City of Easton,* (Northampton County, No. 1996-C-1359, opinion and order filed May 14, 1997). Meanwhile, on April 10, 1997, a complaint in mortgage foreclosure had been filed against the Dennises

[3] Common pleas remanded to the Board pursuant to 2 Pa. C.S. Section 754(a), which provides: **Incomplete record.** – In the event a full and complete record of the proceedings before the local agency was not made, the court may hear the appeal de novo, or may remand the proceedings to the agency for the purpose of making a full and complete record or for further disposition in accordance with the order of the court.

alleging default of payments since September 27, 1991.

On March 3, 1999, the Board convened a hearing. Based on evidence that the Dennises' store and residence had been sold to the foreclosing creditors at sheriff's sale on November 7, 1997 and now belongs solely to Richard and Barbara Young, the Board concluded that the Dennises lacked standing and dismissed their administrative review. The Dennises did not appeal the Board's decision. Rather, the filed their third complaint.

This third complaint, from which the present appeal arises, sets forth in three counts, claims for: (1) review under Local Agency Law of the store's closure; (2) damages, under 42 U.S.C. §1983, for violation of procedural due process guarantees under the federal and state constitutions, and; (3) damages for the "economic and non-economic losses" resulting from closure of their store without " the prompt and timely post-deprivation hearing as mandated by state law,

and as required by the [remand] Order...[in violation of] Due Process of Law and the Equal Protection of the Laws".[4] The City and its Board of Health moved for summary judgment. Following argument, common pleas granted the motion, concluding that:

> The hearing held by the Board of Health on March 3, 1999, complied with this court's order dated May 14, 1997. The record from that proceeding clearly demonstrates that plaintiffs' claims that the Board of Health acted arbitrarily and capriciously were moot and that the Board was justified in dismissing plaintiffs' claims. Furthermore, because the dismissal of plaintiffs' claims by the Board was proper, plaintiffs were not denied due process or equal protection. Plaintiffs therefore cannot recover under any of their three causes of action and defendants are entitled to judgment as a matter of law.

Dennis v. City of Easton, (Northampton County, No. 1999-C-2133,

[4] While it is not clearly stated in the complaint, plaintiffs characterize both counts 2 and 3 in their appellate brief as, "for civil liability under the Federal Civil Rights Act Of, 42 U.S.C. Section 1983."

filed November 27, 2000), slip op. at 7. In the present appeal, the Dennises contend that the sale of the store in 1997 has not mooted their claim for damages: a claim they assert arises under 42 U.S.C. § 1983 as a result of the Board's refusal to conduct the due process hearing as common pleas directed in its order of May 14, 1997. The Dennises argue that their present claim is not collaterally estopped by the federal decision because the Board violated anew their right to due process when it declined to proceed with the hearing. There is no merit to these contentions.[5]

The federal district court held that the pre-closure notices of continuing health code violations and the 1994 post-closure review hearing before the Board, albeit not stenographically transcribed, afforded the Dennises all the

[5] In reviewing the entry of summary judgment, we examine the record in the light most favorable to the non-moving party and will affirm only when there is no issue of material fact and the movant is entitled to judgment ass a matter of law. *Ertel v. Patriot-News Co.*, 544 Pa. 93, 98, 674 A.2d 1038, 1041 (1996).

due process to which they were entitled. In his very thorough opinion for the U.S. District Court for the Eastern District, Senior Judge Troutman summarized the decision:

> Thus, it is apparent that both the notice and the hearing component of the Health Code provided for adequate due process as required by the Fourteenth Amendment. Additionally, it is clear from the evidence that the defendants followed the notice and hearing procedures set forth in the Health Code. Consequently, plaintiffs have failed to demonstrate that there is a genuine issue of material fact in dispute regarding denial of procedural due process.

Dennis v. City of Easton, (E.D. Pa. No. 94-CV-5073, filed January 24, 1996), slip op at 23. This ruling collaterally estops the Dennises from maintaining any claim based on alleged denial of procedural due process associated with the closure of the store itself. The Dennises' claim under §1983 does not exist in the absence of a constitutional civil rights violation, *seeFarrar v. Hobby*, 506 U.S. 103, 115 (1992), and the Dennises are collaterally estopped from asserting this

claim.

Moreover, to the extent that the Dennises attempt, in their third complaint, to fashion a Section 1983 claim based on the Board's dismissal of the remand hearing, such a claim is without merit. When common pleas remanded the matter, it did so in order to facilitate judicial review pursuant to the Local Agency Law[6], a review which could lead to reversal of the administrative action, but which would not provide for damages. When the Board convened the remand hearing, it became evident that the Dennises had long since been divested of any interest in the property. This rendered moot any further review under the Local Agency Law of the administrative decision to close the store. Clearly, dismissal of a claim which has become moot is not a violation of due

[6] We note that the Dennises, by filing the three complaints, never properly pursued a timely judicial review of the Board's 1994 decision sustaining the closure of the store. However, the appropriateness of common pleas' undertaking such a review in the context of the second complaint is not an issue before us in the present appeal.

process.

The Dennises have been afforded due process; this point has been fully litigated and finally determined; further litigation of the issue, in the guise of a Section 1983 claim or in any other manner, is estopped. Further, judicial review under Local Agency Law is undeniably moot in light of the fact that the Dennises no longer held any interest in the property. For these reasons, no claims by the Dennises remain to be litigated. The City and its Board of Health are entitled to judgment as a matter of law and, therefore, common pleas properly entered summary judgment in their favor. Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER Judge

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL DIVISION – LAW

RICHARD DENNIS and PENELOPE DENNIS	)	NO. 1999-C-2144
Plaintiff	)	
v.	)	
CITY OF EASTON and EASTON BOARD OF HEALTH,	)	
Defendants	)	

ORDER OF THE COURT

AND NOW, this 27th day of September 2000,

defendants' motion for summary judgment is hereby granted.

BY THE COURT,

Robert A. Freedberg, P.J.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL DIVISION – LAW

RICHARD DENNIS and PENELOPE DENNIS	)	NO. 1999-C-2144
Plaintiff	)	
v.	)	
CITY OF EASTON and EASTON BOARD OF HEALTH,	)	
Defendants	)	

OPINION OF THE COURT

This case is before the court on defendants' motion for summary judgment. Briefs were filed by both parties and the case was listed for the argument list of August 29, 2000. For the reasons stated in the following opinion, the defendants' motion will be granted.

BACKGROUND

This action constitutes the third lawsuit filed by plaintiffs in response to an order of the City of Easton Board

of health that closed a business operated by plaintiffs known as Penny's Corner Store. On May 17, 1994, the City Sanitarian closed the store for alleged violations of the City Health Code. In response to the closing, plaintiffs requested a hearing before the Board of Health. A hearing was held on June 30, 1994, after which the Board of Health issued a decision affirming the closure of plaintiffs' store.

On July 25, 1994, plaintiffs filed an action before this court asserting that the Board of health's decision was arbitrary and capricious and that plaintiffs' due process and equal protection rights had been violated. The defendants had the case removed to federal court and moved for summary judgment. On February 24, 1995, a federal

arbitration panel heard the matter and found for defendants on all counts.

Plaintiffs appealed the decision to the District Court for the Eastern District of Pennsylvania. On January 22, 1996, the Honorable E. Mac Troutman, S.J., issued a memorandum opinion and order granting defendants' motion for summary judgment as to the claims of violations of equal protection and due process but dismissing without prejudice the claim challenging the Board of Health's decision as arbitrary and capricious.

Plaintiffs initiated the second lawsuit on February 20, 1996, asserting that: (1) they did not receive notice that their store was in violation of the City Health Code or that it would be closed; (2) they did not receive a hearing before the Sanitarian

closed their store; and (3) the Board of health's decision was arbitrary and capricious. Defendants again moved for summary judgment. On May 14, 1997, this court ruled that plaintiffs were collaterally estopped from pursuing their claims as to the issues of notice and hearing. As to the claim that the Board of health's decision was arbitrary and capricious, this court remanded the matter to the Board of Health so that a full and complete record could be made and stenographically recorded concerning the basis for the closing of plaintiffs' store. See 2 Pa. C.S. §754(a).

A hearing was held on march 3, 1999, before the Board of Health. The testimony was stenographically recorded and transcribed. Richard A. Young testified that the subject property was

currently titled in his and his wife's names and that he and his wife purchased the property on October 30, 1998, from Nathan and Jeanette Reibman. The Reibmans had previously filed a complaint on April 10, 1997, alleging that plaintiffs herein were in default on a mortgage that the Reibmans held on the property. On June 2, 1997, a writ of execution was issued and the property was sold at sheriff's sale on November 7, 1997. Young further testified that he had no plans to sell or lease the property to the plaintiffs.

After the hearing, the Board of health held that, because the Youngs currently owned the property, plaintiffs lacked standing to challenge the closing of the store. Plaintiffs then filed their third lawsuit on March 25, 1999, asserting that they were

entitled to a hearing on whether the prior adjudication affirming the closing of the store was arbitrary and capricious and that the Board of Health's refusal to hear plaintiffs' claims at the march 23, 1999 hearing violated their due process and equal protection rights. Defendants filed their instant motion for summary judgment.

DISCUSSION

Summary judgment may be granted when there is no genuine issue as to any material fact or when an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action, thus entitling the moving party to judgment as a matter of law. Pa. R.C.P. 1035.2. The record must be examined in the light most favorable to the non-moving party, and all

doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Ertel v. Patriot-News Company,* 674 A.2d 1038, 1041 (Pa. 1996).

Under 2 Pa. C.S. §754, relating to the disposition of an appeal from a local agency, our course of action depends on whether or not a full and complete record was made of the proceeding before the Board of health. As previously mentioned, the hearing was stenographically recorded and transcribed, thus qualifying as a full and complete record. We will therefore proceed under 2 Pa. C.S. §754(b), which provides that appellate review of an administrative order is limited to determining whether: (1) constitutional rights were violated; (2) the adjudication is in accordance with law; (3) an

error of law or a violation of the administrative agency procedure has occurred; or (4) the necessary findings of fact are supported by substantial evidence. Plaintiffs' first cause of action arises under the Administrative Agency Law, 2 Pa. C.S. §751 et seq. Plaintiffs allege that the decision to close their store was arbitrary and capricious and contrary to law. Plaintiffs assert that, pursuant to Order of Court dated May 14, 1997, they were entitled to a hearing before the Board of Health and that the Board's dismissal based on lack of standing was erroneous.

Standing under the Local Agency Law is defined in 2 Pa. C.S. §752, which states: "[a]ny person aggrieved by an adjudication of a local agency who has a direct interest in such

adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." This standard is more liberal than the traditional standing requirements. *Nernberg v. City of Pittsburgh,* 620 A.2d 682, 695 (Pa. Cmwlth 1993). A person aggrieved must have a direct interest that is adversely affected by the action that he seeks to challenge. *Id.* n. 8. "One has a direct interest. .if he is able to show that the adjudication causes harm to an interest of his; i.e., he must show that the claimed harm to his interest can be said to have resulted in some concretely demonstrable way from the adjudication." *Id.*

The adjudication of the Board of health shut down

plaintiffs' business. Thus, it is clear that plaintiffs had a direct interest that was adversely affected by the Board's decision. The Board's conclusion that plaintiffs lacked standing was therefore erroneous. The plaintiffs had standing to challenge the prior adjudication that closed plaintiffs' store.

"It has been held, however, that where a court makes a correct ruling, order, decision, judgment, or decree but assigns an erroneous reason for its action, an appellate court will affirm the action below where the correct basis for the ruling, order, decision, judgment, or decree is clear upon the record." *Haney v. Workmen's Compensation Appeal Bd.*, 442 A.2d 1223, 1226 (Pa. Cmwlth. 1982). The *Haney* court noted that "the same rule of law applies when...an administrative agency assigns an erroneous reason

to a correct decision and the record clearly shows the correct basis for that decision." *Id.* (citing *Hankinson v. Dept. of Public Welfare,* 425 A.2d 624, 627 (Pa. Cmwlth. 1981).

The record clearly shows that the adjudication dismissing plaintiffs' appeal was supported by the fact that plaintiffs no longer owned or had any interest in the subject property. "Intervening changes in the factual matrix of a pending case, which eliminate an actual controversy and make it impossible for the requested relief to be granted, render a legal question moot." *Zemprelli v. Thornburgh,* 466 A.2d 11232, 1124 (Pa. Cmwlth. 1983). "[T]o avoid dismissal for mootness, an actual case or controversy must exist at all stages of the administrative or judicial process." *Metro*

Transportation Company v. Pennsylvania Public Utility Commission, 563 A.2d 228, 230 (Pa. Cmwlth. 1989). "[W]hen the court or agency is not able to grant effective relief, a case will be dismissed as moot." *Id.* Plaintiffs are seeking to overturn the adjudication that closed their business. Plaintiffs cannot reopen the store, however, because they no longer own or have any interest in the property. Furthermore, the testimony showed that the present owners had no intention of leasing or selling the property to plaintiffs. Thus, the case was properly dismissed by the Board of Health because the Board of Health would not have been capable of granting effective relief, thereby rendering the case moot.

Plaintiffs argue that they should be able to proceed with the claims because, if it is determined

that the closing of the store was done arbitrarily and capriciously, they are entitled to damages. Plaintiffs do not cite any authority for the proposition that an aggrieved party can recover monetary damages based on a finding of improper agency action under the Public Health Code of the City of Easton or under the Local Agency Law.

The provisions of the Local Agency Law, 2 Pa. C.S. §751 et seq do not provide a cause of action for damages. In addition, "when an adjudication is not affirmed the court may only enter an order authorized by the Judicial Code." *In re Leopardi* 532 A.2d 311, 315 (Pa. 1987) (interpreting 2 Pa. C.S. §754). The *Leopardi* Court held that, even if an appellate court reverses the agency adjudication, it cannot award relief that could not have been

awarded by the agency. *Id.* (interpreting 42 Pa. C.S. §706, relating to the disposition of appeals and the effect on appeals brought under the Administrative Agency law).

There is no provision for an award of damages under the City Health Code. In fact, §1191.11 of the Code states that, "[a]fter the hearing, the Board shall sustain, modify or revoke the notice of the Public Defender. " Thus, the only remedies available to plaintiffs are modification or revocation of the notice issued by the Sanatarian. Plaintiffs would not be able to obtain an award of damages from either the Board of Health or this Court and, therefore, are not entitled to proceed with those claims.

Plaintiffs, in their second and third causes of

action, assert that the Board of Health violated plaintiffs' due process and equal protection rights by intentionally delaying the scheduling of a hearing and by failing to provide a full hearing. There is no evidence of record to support plaintiffs' contention that the Board intentionally delayed the scheduling of a hearing. Furthermore, as previously discussed, it was unnecessary to hold a full hearing because plaintiffs' claims had become moot. Thus, plaintiffs were not entitled to proceed with any claims before the Board of Health and there was no violation of due process or equal protection.

CONCLUSION

The hearing held by the Board of Health on Mach 3, 1999, complied with this court's order dated May 14, 1997. The record from that proceeding

clearly demonstrates that plaintiffs' claims that the Board of Health acted arbitrarily and capriciously were moot and that the Board was justified in dismissing plaintiffs' claims. Furthermore, because the dismissal of plaintiffs' claims by the Board was proper, plaintiffs were not denied due process or equal protection. Plaintiffs therefore cannot recover under any of their three causes of action and defendants are entitled to judgment as a matter of law.

WHEREFORE, we enter the following order:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RICHARD DENNIS and PENELOPE DENNIS, husband and wife, and LORETTA M. DENNIS,	:	CIVIL ACTION
	:	94-CV-5073
Plaintiffs	:	
vs.	:	FILED Jan. 23,
CITY OF EASTON, et., al	:	1995

TROUTMAN, S.J.

ORDER

AND NOW, this 22nd day of January, 1996, upon consideration of defendants' motion for summary judgment on all counts of plaintiffs' complaint (Doc. #) defendants' memorandum of law in support thereof, plaintiffs' response thereto, and all other relevant matters of record, it is hereby ordered, adjudged and decreed that the motion is GRANTED.

IT IS FURTHER ORDERED judgment is

entered in favor of all defendants and against all plaintiffs on all counts of the complaints.

ENTERED 1/24/96

E. MAC TROUTMAN, S.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

RICHARD DENNIS and PENELOPE DENNIS, husband and wife, and LORETTA M. DENNIS,	:	CIVIL ACTION
Plaintiffs	:	94-CV-5073
vs.	:	
CITY OF EASTON, et., al	:	

TROUTMAN, S.J.

MEMORANDUM

The above captioned matter is now before the Court on the motion of defendants, City of Easton, Edward J. Ferraro, Robert S. Stein, Doris Asteak, Paul Schleuter, Howard B. White and the Easton

Board of Health (hereinafter "defendants") for summary judgment. This action arises from the closing of plaintiffs' procedural due process rights, first, by failing to provide adequate notice to plaintiffs prior to the closure, and second, by failing to provide an opportunity to be heard in compliance with due process safeguards. In Count II, plaintiffs allege that defendants deprived them of equal protection under the Constitution in closing plaintiffs' store while purportedly failing to enforce the Health Code against other "mom and pop" stores in Easton. Count III alleges that the Board of Health's decision to validate the closure by the City lacked an adequate factual basis, and, therefore, is in essence an appeal of the Board of Health's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Penelope Dennis, along with her husband, Richard, and oldest daughter, Loretta, ("plaintiffs') owned and operated Penny's, a small neighborhood store located in Easton, Pennsylvania, since 1970. The building is an older "double-house" which was converted into a store/house prior to plaintiff's ownership.[1] The store operated solely as a convenience store till 1987, at which time the plaintiffs "added" a delicatessen within the store.

On December 11, 1991, the City Sanitarian, Edward Ferraro, one of the defendants, conducted an inspection of Penny's pursuant to express

[1] Plaintiffs live in the "house" section of that building.

provisions in the Third Class City Code.[2] Although Ferraro determined that the store was conditionally satisfactory, he cited several Health Code violations which were in need of correction in order to comply with the Health Code. Ferraro explicitly specified the violations, along with the appropriate measures to take in order to cure them, in an official inspection report which he provided to the plaintiffs subsequent to the inspection. In response to the inspection report, plaintiffs sent a letter to Ferraro

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[2] (a) Subject to the limitations of the Constitution of the United States and of the Commonwealth of Pennsylvania and the Third Class City Code and in order to carry out the purpose and provisions of the City Health Code, the Public Officer or any other authorized officer or employee of the Board upon showing proper identification of office, may enter, examine, survey and inspect any establishment, place or other interpreted grounds or premises or parts thereof and all persons working and equipment used in or in connection therewith and any truck, wagon or other vehicle used in transporting, selling or handling food at all reasonable times and in an emergency at any time and as often as he or any of them deem necessary. See, Easton City Health Code, Art. 1191 §1191.05(a).

which outlined the remedial measures they anticipated taking in order to remedy the violations. (See, Letter from Richard Dennis, Jr. to Ed Ferraro, Exhibit "E" to Defendants' Motion For Summary Judgment, Doc. #11).

Following the inspection of December 11, 1991, there is evidence that Ferraro sent out numerous letters and notices. (See, Plaintiffs' admissions, Exhibit "L" to Doc. #11). These letters and notices warned the plaintiffs that unless measures were taken to correct the violations, the City would have not alternative but to close the store in accordance with the Health Code. Plaintiffs acknowledged in arbitration testimony that they received several letters from defendant Ferraro. In answers to Defendants' Request For Admissions, the

plaintiffs conceded that they received letters from defendant Ferraro on the following dates: November 2, 1993, December 14, 1993, December 16, 1993, January 26, 1994, February 1, 1994, and February 4, 1994. These letters stressed the need for plaintiffs to make corrections in order to avoid closure by the City. (See Exh. "M", "N", "O", "P", "Q", and "R" to Doc. #11). Moreover, there is also evidence on the record which indicates that the plaintiffs in fact responded to these warnings in letters to the City. (See Exh. "F", "G", and "H" to Doc. #11).

Most notably, on January 31, 1994, plaintiff Richard Dennis sent a letter to defendant Ferraro indicating that the Plaintiffs were "securing cost effective ways to solve the problem," and that severe weather conditions had impeded their progress. (See

Exh. "G" to Doc. #11). On February 1, 1994, Ferraro wrote a letter to the plaintiffs stating that no information regarding remedial measures had been supplied by the plaintiffs and additionally, that no work permits had been issued by the City Codes and Inspections Office. (Id. Exh. "Q"; See also Plaintiffs' Admissions, Exh. "L", paragraph 8).

Amidst the exchange of letters, on December 16, 1993, at the request of Loretta Dennis, the Mayor of Easton conducted a meeting at his office with the plaintiffs and Sanitarian Edward Ferraro, assistant City Solicitor Theresa Hogan, and City Safety Director Alvin Fairchild. At this meeting, Loretta Dennis explained that the plaintiffs were going to close the delicatessen, only, as of January 1, 1994. She emphasized that the closure was based on

financial concerns, and not concerns about health violations. Accordingly, on Sunday, January 1, 1994, plaintiffs closed the delicatessen as promised, installing a partition wall closing off the deli area from the rest of the store.

Subsequently, on March 2, 1994, Assistant City Solicitor Theresa Hogan wrote to plaintiffs' attorney, Keene Jabbour, to notify him that due to plaintiffs' ongoing violations, their license to operate had expired and would not be renewed until the store was in full compliance with the City Health Code. (See Exh. "T" to Doc. #11). Finally, on May 17, 1994, two-and-a-half years after the initial inspection, defendants Ferraro and Dr. Stein, on their second visit to the store that day, closed down the store and placed a placard on plaintiff's door

which cited the specific remaining violations as determined by defendants Ferraro and Dr. Robert Stein on that day. In the course of the closing, defendant Ferraro handed the plaintiffs a letter which described the remaining violations along with an explanation of the plaintiffs' right to an appeal before the City Board of Health. (See, Exh. "U" to Doc. #11).

The plaintiffs timely requested a hearing on the closure pursuant to Section 1191.11 of the City's Health Code. The hearing took place on June 30, 1994, before the City's Board of Health. The Board consisted of five members, one of which was absent. The plaintiffs' neighbor, Doris Asteak, was one of the

board members.[3] Plaintiffs were represented by their present counsel, Richard Orloski. The plaintiffs, on the advice of counsel, chose not to testify at the hearing, and, therefore, did not contest the existence of the violations which supported the City's decision to close the store. Counsel for plaintiffs did, however, cross-examine to the City's witnesses, Sanitarian Edward Ferraro and Health officer Dr. Stein. Six neighbors of the plaintiffs attended the Board meeting, intending to testify about the conditions at the store, but the Board

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[3] Doris Asteak, a member of the Board of Health and a neighbor of the plaintiffs, is the mother of Alan Asteak. The plaintiffs allege that Alan Asteak expressed a strong interest in purchasing "Penny's" and that Asteak had actually engaged in "serious negotiations" for the purchase of the store during the relevant time period. It is plaintiffs' contention that City Officials improperly conspired to force the plaintiffs to close their store so that Alan Asteak could then purchase the store for a price below fair market value. See Complaint at para. 13-25.

voted 3-1 not to permit the neighbors to testify.[4]

Following the hearing, on July 25, 1994, plaintiffs filed this action in Northampton County Court of Common Pleas appealing from the Board's decision upholding the closure order and asserting due process and equal protection claims. The matter was removed to this Court and was tried by a federal

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[4] In opposition to Defendants' motion for summary judgment, plaintiffs also submitted numerous "affidavits", more properly termed testimonials, from customers concerning their opinions of the cleanliness of the store and their satisfaction with it as regular customers. Such testimonials, however, are of no significance since the Easton City Health Code vests in the city Sanitarian the responsibility for determining violations of the Health code in accordance with standards set forth therein.

Absent evidence that customers were aware of all of the specific provisions of the health Code and of the compliance of plaintiffs and other store owners with such provisions, the opinions of and comparisons drawn by customers are utterly irrelevant to the issues before the Court on the pending motion.

Moreover, assuming that the testimony to be offered at the plaintiffs' hearing would have been similar to the proffered affidavits, such testimony would likewise have been completely irrelevant at that proceeding.

arbitration panel on February 24, 1995. The arbitration panel found in favor of the defendants on all three counts.

STANDARDS FOR SUMMARY JUDGMENT

Summary judgment shall be granted when there are no genuine issues of material fact in dispute and the movant is entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c) (emphasis added). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d. 202 (1986). In evaluating whether there are any disputed issues and whether they are both genuine and material, the Court must consider the facts in the light most favorable the party opposing

summary judgment and all reasonable inferences must be drawn in favor of the nonmoving party. Josey v. John R. Hollingworth Corp. 996 F.2d 632, 637 (3d Cir. 1993); Gray v. York Newspapers, Inc. 957 F.2d 1070, 1077 (3d Cir. 1992).

In order to obtain summary judgment, the moving party must, on the basis of pleadings, depositions, answers to interrogatories, and admissions on file, demonstrate an absence of genuine issues of material fact in dispute. Fed. R.Civ.P. 56 (c). Once the moving party has satisfied that requirement, the burden shifts to the nonmoving party to present evidence that there is a genuine issue for trial. Celotex Corp. v. Catratt, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Furthermore, the nonmoving party is required to

identify specifically the evidence upon which a verdict in its favor may be based. Childers v. Joseph, 842 F.2d 689 (3d Cir. 1987). Thus, the nonmoving party is obliged to identify those facts of record which would contradict the facts identified by the movant. Id. Mere denials are not sufficient to withstand the motion for summary judgment. Equimark v. C.I.T. Financial Services Corp., 812 F.2d 141 (3d Cir. 1987).

Accordingly, where the nonmoving party bears the burden of proof on an issue, it must identify evidence of record which suffices to establish every element essential to the claim. Celotex, 477 U.S. 317; Financial Services Corp. 812 F.2d 141 (3d Cir. 1987). When a record is such that it would not support a rational finding that an

essential element of the nonmoving party's claim or defense exists, summary judgment must be entered for the moving party. 812 F.2d 141 (3d Cir. 1987). When a record is such that it would not support a rational finding that an essential element of the nonmoving party's claim or defense exists, summary judgment must be entered for the moving party. Celotex 477 U.S. at 322.

Plaintiffs allege in Count I that Defendants violated their procedural due process rights which are guaranteed under the Fourteenth Amendment of the Constitution.[5] In the first instance, plaintiffs

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[5] The pertinent text of the Fourteenth Amendment provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (emphasis added).

contend that the notice component of their due process rights was deficient in the time period preceding the closure of the store on May 17, 1994. Additionally, plaintiffs argue that the defendants violated plaintiffs' due process right to an opportunity to be heard in an appropriate forum.

At the outset we note that the requirements of procedural due process apply only to deprivations of liberty and property interests encompassed under the Fourteenth Amendment. Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 94 L.Ed. 865, 70 S.Ct. 652 (1950). In challenging the state's actions for a violation of procedural due process, a plaintiff, in addition to proving that the state deprived it of a protected property interest, must establish that the state procedure for

challenging the deprivation does not satisfy the requirements of due process. Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) (emphasis added). Due Process requires at a minimum that deprivations of life, liberty or property by the State be accompanied by notice and an opportunity for hearing which is suitable to the nature of the case. Mullane v. Central Hanover Bank and Trust Company, 94 L.Ed. at 873 (1950), (Court struck down on due process grounds a New York statute that allowed a trust company, when it sought a judicial settlement of its trust accounts, to give notice by publication to all beneficiaries even if the whereabouts of the beneficiaries were known; the Court held that personal notice in such situations was required and state that "when notice

is a person's due, process which is a mere gesture is not due process); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985), (Court concluded that where the interest being terminated was a public-sector job, a full adversarial evidentiary hearing would "intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee").

Due process, as interpreted by the Supreme Court, is not a rigid concept. Rather, it varies with the particular situation. Zinermon v. Burch, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990). "The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." Mitchell v. W.T. Grant

Co., 416 U.S. 600, 610, 40 L.Ed.2d 406, 415, 94 S.Ct. 1895, quoting Cafeteria Workers v. McElroy 367 U.S. 886, 895, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961); Morrissey v. Brewer 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972) ("Due process is flexible and calls for such procedural protections as the particular situation demands").

Underscoring this notion of flexibility in due process, the Supreme Court has adopted a balancing of the interests approach in assessing what specific process is due for a particular deprivation.[6] The costs of requiring a particular set of procedures is weighed against the benefits from the use of those

[6] The interests which are balanced include the private interest that will be affected by the official action along with the possible length of a wrongful deprivation, the likelihood of governmental error and the probable value of additional procedural safeguards, and the significance of the governmental interest involved. Mathews v. Elridge, 424 U.S. 391, 96 S Ct. 893, 47 L.Ed.2d 18 (1976).

procedures. Mathews v. Elridge, 425 U.S. 391, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). (In holding that Social Security disability benefits could be terminated without a prior evidentiary hearing, the Court weighed the costs of the procedures against the benefits).

Applying these principles to the case before us, our initial inquiry is whether the plaintiffs have suffered a deprivation of property or a liberty interest which would invoke the protections of the due process clause. Clearly, plaintiffs have a substantial property interest in operating their store. In closing the store, therefore, the City deprived the plaintiffs of a significant property interest.

The Fourteenth Amendment, however, does

not protect against all deprivations of life, liberty, or property by the State, but only against deprivations "without due process of law." Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981); Baker v. McCollan, 443 U.S. 137, 61 L.Ed.2d 433, 99 S.Ct. 2689 (1979).

Accordingly, our next step is to assess whether the plaintiffs were accorded the appropriate procedural due process required by the Fourteenth Amendment. Initially, we will analyze the City's procedure for providing notice and determine whether it satisfies the notice requirement of due process.[7]

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[7] The Supreme Court has stated that because "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." Vitek v. Jones, 445 U.S. 480, 491, 63 L.Ed.2d 552, 100 S.Ct. 1254 (1980).

The City's procedure for providing notice of Health Code violations is set forth in the following provision of the Health Code, which is found in Section 1191.09:

(b) The notice shall:
(1) Be in writing;
(2) Include a statement of the reasons why it is being issued.
(3) Specify a reasonable time for the performance of act or acts required to abate violation; and
(4) Inform the person responsible for compliance of his right of hearing.

In evaluating the notice provision cited above, we must determine whether this procedure is sufficient to meet the notice component of due process, as interpreted by the Supreme Court.

Regarding the Due Process requirement of notice, the Supreme Court has stated , "[a]n elementary and fundamental requirement of due process...is notice reasonably calculated, under all

the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane, 339 U.S. at 315; 94 L.Ed. at 873. Milliken v. Meyer 311 U.S. 457, 85 L.Ed. 278, 61 S.Ct. 339: Grannis v. Ordean, 234 U.S. 385, 58 L.Ed. 1368, 34 S.Ct. 779. As such, the notice must reasonably convey the required information and allow a reasonable time for the interested party to make an appearance. Mullane 94 L.Ed. at 873 (emphasis added).

In the present case, it is apparent that the notice provision of the City's Health Code complies with the requirements of due process. It provides for written notice which not only explains the reasons for which it is being issued but delineates the steps that those affected should take in order to correct

the situation. This requirement of explaining the violations and the necessary corrections meets the due process threshold requirement of "reasonably conveying the required information."

Furthermore, the provision allows for a reasonable period of time in which those affected can either cure the alleged violations or prepare for an opportunity to present their objections at a hearing. Thus, we conclude that the required notice of Health Code violations provides appropriate due process safeguards, and we must now assess whether these safeguards were followed by the City in the present case.

The evidence on the record clearly demonstrates that the City's actions preceding the closure of Penny's did not deviate from the

requirements of the City's notice provision, and therefore, satisfied due process. Defendant Ferraro, upon inspecting the premises on December 11, 1991, issued an official inspection report which cited all the violations (Doc. #11, Exhibit "D") The report included a narrative description of the ways in which the violations could be corrected. A copy of this inspection report was sent to the plaintiffs. It is undisputed that the plaintiffs received the inspection report. (See, n. 4). Moreover, as stated previously, the plaintiffs sent defendant Ferraro a letter delineating the remedial measures they anticipated making in order to correct the violations. (See Doc. #11, Exhibit "E"). by acknowledging the need for such remedial measures, the plaintiffs conceded knowledge of the existence of the cited

violations, and therefore, cannot subsequently disclaim awareness of them.

Although plaintiffs assert that no further official inspection was conducted after they received the December, 1991, report and that there were no Health Code violations I the store between December, 1993 and May, 1994, closing of the store, such assertions are belied by their failure to deny the existence of continuing violations until their response to the instant motion. Previously, however, they admitted receiving letters dated December 14, 1993, January 26, 1994, February 1, 1994, and February 4, 1994 which referred to continuing violations. (See, Doc. #11, Exhibit "L", Plaintiffs' Admissions). Each such letter notes that corrections had not been made and that continued failure to

correct the violations would result in the closing of the store. (Id Exhibits "N", "P", "Q", "R"). Moreover, as noted, plaintiff's Robert (sic) and Penelope Dennis conceded in testimony that they saw numerous letters between December, 1991 and May, 1994, indicating that the City still considered them to be in violation of Health Code provisions, that the City was threatening to close the store and that they understood the significance of such letters.

In addition, in their own contemporaneous written responses to defendant, Ferraro, plaintiffs do not dispute the existence of continuing violations. On December 17, 1993, e.g. plaintiff Loretta Dennis acknowledged that certain conditions, including thorough daily cleaning of the slicer and cutting surfaces,, had to be fulfilled to permit the store's deli

to remain open until January 1, 1994. Id Exh. "F"). The only reasonable inference to be drawn from setting forth her agreement to such conditions is that the referenced procedures had not previously been followed. Similarly, a letter dated January 31, 1994, addressed to defendant Ferraro stated that plaintiffs were "securing cost-effective ways to solve the problem" (Id Exh. "G"). It is reasonable to infer from such letter that a "problem" of which plaintiffs were aware existed in the store.

finally, an attorney, Keene Jabbour, stating that he represented plaintiffs, sent a letter to defendant Ferraro dated February 8, 1994, and explicitly stated that plaintiffs were actively engaged in negotiations with an unspecified buyer to sell the business, but that "If this buyer does not

enter into a contract for the purchase of this property within the next two weeks, my clients will obtain financing to enable them to correct the violations cited in the report by your office dated December of 1991." (Id Exh. "H"). Although plaintiffs refused to admit knowledge of letters sent to or by attorney Jabbour, they have not denied that he represented them during this period.

We conclude that plaintiffs' own actions and writings, as well as their sworn testimony at the arbitration hearing establish that they received adequate notice of the City's actions. Plaintiffs' attempt, in response to the instant motion, to raise disputed issues of material fact concerning the adequacy of the pre-closing notice is wholly ineffective, since a party cannot create factual

disputes by contradicting prior testimony. Martin v. Merrell Dow Pharmaceuticals, Inc. 851 F.2d 703 (3d Cir. 1988).

From the day of the initial inspection, when the violations were first cited by Ferraro, a two-and-a-half year time interval elapsed before the closure of the store, during which, as noted above, plaintiffs acknowledged the violations and promised to correct them. This was more than a reasonable amount of time for the plaintiffs to address the situation.

In addition, upon closure of the store, the defendants advised the plaintiffs of their right to a hearing in a letter which was given to the plaintiffs the day of the closure, May, 17, 1994. (See Plaintiffs' Admissions, Exhibit "L", para. 13, authenticating and admitting receipt of May 17,

1994 letter). As counsel for defendants submits, in light of the fact that the plaintiffs requested and received a hearing, it is apparent they were made aware of their right to a hearing.

In light of the foregoing analysis, it is evident that not only does the notice provision of the City Health Code comply with the notice requirements of due process, but additionally, that the defendants did in fact follow the terms of the Health Code notice provision. The evidence is clear that the City methodically followed the steps outlined in the notice provision and allowed the plaintiffs more than a sufficient amount of time to take appropriate action. Perhaps most persuasive is the fact that plaintiffs themselves admit that they received the numerous letters that defendant Ferraro sent to

them. There is, therefore, no issue of material fact regarding whether the plaintiffs had notice of the City's actions, since the facts of record clearly indicate that the plaintiffs did indeed receive sufficient notice.

Shifting our focus to the second component of due process, the Supreme Court has held that, in addition to the requisite notice, a fundamental requirement of due process is the opportunity to be heard., "which must be granted at a meaningful time and in a meaningful manner." Parratt v. Taylor, 451 U.S. 527, 540, 68 L.Ed.2d 420, 432, 101 S.Ct. 1908, quoting Armstrong v. Manzo, 380 U.S. 545, 552, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965).

As the Supreme Court has stated, however, this right to be heard does not always require the

State to provide a hearing prior to the initial deprivation of property. Parratt, 14 L.Ed.2d at 432 (Court stated that the rationale for this is based in part on the impracticality in some cases of providing any preseizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available). Essentially, all that is required is "some form of a hearing" before the owner is finally deprived of a property interest. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). As such, post-deprivation remedies provided by the State can satisfy the requirements of the due process clause. See, e.g., Logan v. Zimmerman Brush Co., 445 U.S. 422, 436, 71 L.Ed.2d 265, 102 S.Ct. 1148 (1982).

Moreover, where the governmental interest behind the deprivation is one which involves the public health or the abatement of a nuisance, the need for expediency may necessitate a seizure or deprivation prior to the occurrence of a hearing. See, In North American Cold Storage Co. v. Chicago, 211 U.S. 306, 53 L.Ed.2d 195, 29 S.Ct. 101 (1908). (Supreme Court upheld the right of a State to seize and destroy unwholesome food without a preseizure hearing; need to protect public health an overwhelming concern); Fahey v. Mallonee, 339 U.S. 245, 91 L.Ed. 2030, 67 S.Ct. 1552 (1947). (Supreme Court recognized that the protection of the public interest against economic harm can justify the immediate seizure of property without a prior hearing when substantial questions are raised about

the competence of a bank's management).

In the present case, the hearing provision in the Health Code provides for an appropriate post-deprivation remedy. The primary purpose of the Health Code is the protection of public health and safety, a significant state interest which rationalizes the need for a post-deprivation rather than a pre-deprivation remedy. Moreover, the hearing provision affords an aggrieved party an opportunity to be heard within thirty days of the deprivation, thereby precluding the possibility of a lengthy

wrongful deprivation.[8] We conclude that by guaranteeing the right to a hearing before the Board of Health within forty days of the initial deprivation, the Health Code hearing provision comports with the requirement of an "opportunity to be heard granted at a reasonable time and in a meaningful manner", as mandated by the Fourteenth Amendment.

Additionally, during the course of the hearing in this matter, the plaintiffs were represented by

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[8] The hearing provision reads as follows: (a) Any person aggrieved by a notice may request and shall be granted a hearing in the manner provided in this section. The person requesting a hearing shall, within ten days from the day the notice was served, file in the Office of the Secretary of the Board a petition for a hearing on forms provided by the Board. The Secretary of the Board shall immediately refer the petition to the Board which shall set a time and place for the hearing and shall give the petitioner written notice thereof. The hearing shall be held before the Board not more than thirty days from the day the petition was filed. The petitioner shall have the right to appear at the hearing in person or to be represented by an attorney or by any other person. (Easton City Health Code, Section 1191.11.

their current counsel and were given the opportunity to testify themselves, although they chose not to do so on the advice of counsel. They were also afforded the opportunity to cross-examine Mr. Ferraro and Dr. Stein regarding their findings that the store did not comply with various provisions of the Health Code.

Thus, it is apparent that both the notice and the hearing components of the Health Code provided for adequate due process as required by the Fourteenth Amendment. Additionally, it is clear from the evidence that the defendants followed the notice and hearing procedures set forth in the Health Code. Consequently, plaintiffs have failed to demonstrate that there is a genuine issue of

material fact in dispute regarding denial of procedural due process".[9] We will, therefore, grant defendants' motion for summary judgment on Count I of the complaint.

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[9] We note that plaintiffs contend that the City Officials improperly conspired to close plaintiffs' store in order to harass the plaintiffs and thereby induce them to sell the store to Alan Asteak, the son of defendant, Doris Asteak (a City health Board Member and neighbor of the plaintiffs) for a price below the fair market value. Plaintiffs assert that Alan Asteak was engaged in "serious negotiations" for the purchase of the plaintiffs' store during the time period at issue and that it was well known in the community that defendant Doris Asteak was promoting the purchase of Penny's Corner Store by her son.

There is, however, absolutely no evidence which suggests that a conspiracy existed among City Officials to force the closure of Penny's so that Alan Asteak could purchase the store. This is pure conjecture on the part of the plaintiffs. As counsel for the defendants points out, the arbitration testimony of Richard Dennis contradicts his contention that he and Asteak engaged in serious negotiations regarding the purchase of the store. (See Defendants' Brief, pps. 14-170.

As there is no evidentiary basis for these allegations, we will not address the implications these allegations pose on due process, namely, the suggestion that Doris Asteak's participation in the Board of Health's decision fatally flawed the hearing process.

IV. EQUAL PROTECTION

In Count II the plaintiffs allege that defendants violated the equal protection clause of the Fourteenth Amendment in that the defendants treated similarly situated store owners differently.

The Fourteenth Amendment provides that "[n]o state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws." The Equal Protection clause is only implicated where the government makes a classification, See, Washington v. Davis, 426 U.S. 299, 48 L.Ed.2d 96 S.Ct. 2040 (1976). (Court stated that the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race); Graham v. Richardson, 403 U.S.

365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971) (In holding that states cannot deny welfare benefits to aliens, the Court stated that state classifications based on alienage, race, or nationality are inherently suspect and subject to close judicial scrutiny); Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 297, 97 S.Ct. 451 (1976) (In validating a state statute which forbade the sale of "3.2% beer" to males under the age of 21, and to females under the age of 18, the Court held that classifications based on gender must serve an important governmental objective and must be substantially related to the achievement of those objectives) or **where a fundamental right is involved.** See, Harper v. Virginia Board of Education, 383 U.S. 663, 16 L.Ed.2d 169, 86 S.Ct. 1079 (1966) (Court struck down an annual poll tax

of only $1.50, imposed as a prerequisite for voting); Shapiro v. Thompson 394 U.S. 618, 22 L.Ed.2d 600, 89 S.Ct. 1322 (1968) (Court invalidated the denial by two states of welfare benefits to residents who had not resided in the jurisdiction for at least a year).

In the present case, the plaintiffs allege that they were treated differently from others similarly situated store owners in the City. As such, they contend that the actions taken against them by the City were violative of the Equal Protection clause.

Under the present circumstances, since there is neither a classification nor a fundamental right at issue, the Equal Protection clause is not applicable. The plaintiffs are not, and do not allege that they are members of a protected class, and as such were subjected to improper government action on the

basis of race, alienage or national origin. Rather, the present case involves only the state's treatment of individuals, not the state's treatment of a specific class of people to which Plaintiffs belong. The Equal Protection clause simply does not apply to the adjudication of individual situations, such as the one before us.[10]

The plaintiffs offer absolutely no evidence

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[10] Plaintiffs' contention that Yick Wo v. Hopkins, 118 U.S. 356, 230 L.Ed.2d 220, 6 S.Ct. 1064 (1886(, applies to the present circumstances is incorrect. In Yick Wo., a San Francisco ordinance barred the operation of hand laundries in wooden buildings except with consent of the Board of Supervisors. Although neutral on its face, the ordinance adversely affected the rights of Chinese Americans in that the Board gave permits to all but one of the non-Chinese applicants, but to none of nearly 200 Chinese applicants. The Court held that although the ordinance was neutral on its face, the discrimination in its administration violated the due process clause. Yick Wo, 118 U.S. 356, 30 L.Ed.2d 220, 6 S.Ct. 1064. This discrimination, however, was directed at a class of people based on race, a suspect class under the Equal Protection clause. Therefore, it is wholly inapplicable to the circumstances of the present case, where there is no such classification.

which can support their Equal Protection claim. Consequently, summary judgment will likewise be granted on Count II of the complaint.

* * *

V. APPEAL OF BOARD OF HEALTH'S DECISION

In Count III, plaintiffs allege that the Board of Health's decision was arbitrary and capricious and lacked a factual basis. In determining whether this allegation has a legitimate basis, this Court would essentially be conducting an appellate review of the Board of Health's determination. Thus, to the extent that Count III seemingly seeks relief of an appellate nature, our initial focus is on whether this Court possesses jurisdiction to hear an appeal from the Board of Health's decision, particularly in light

of our determinations that defendants are entitled to summary judgment on plaintiffs' due process and equal protection claims.

A federal district court has no authority to review final judgments of a state court in judicial proceedings.[11] District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476, 482, 75 L.Ed.2d 206, 103 S.Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S.Ct. 149, 68 L.Ed.2d 362 (1923). Moreover, review of such judgments may only be had in the state court system and in the United States Supreme Court. District of Columbia Ct. of Appeals v. Feldman, 460 U.S. 462, 75 L.Ed.2d 206, 103 S.Ct.

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[11] A state agency has been held to be a "state court" for purposes of removal. See United States v. Pennsylvania Environmental Hearing Board 377 F.Supp. 545, 553 (MD Pa. 1974); see also Baughman v. Bradford Coal Co. 592 F.2d 215 (3d Cir. 1979).

1303; Rooker 263 U.S. 413 (1923). This doctrine applies whether or not the state litigation has reached the state's highest court. Worldwide Church of God v. McNair, 805 F.2d 888, 893 n.3 (9th Cir. 1986); Sandomer v. LCCYSSA 1993 WL 245280 * 3 (E.D. Pa.).

Additionally, this rule applies even though a plaintiff alleges deprivation of federally protected due process and equal protection rights. Feldman, 263 U.S. 462. (Court held that a U.S. District Court lacked subject-matter jurisdiction over bar applicant's complaints seeking review of a state court's denial of their petitions for waiver of a bar admission rule requiring bar applicants to be graduates of an ABA approved law school, even if those challenges allege that the state court's action

was unconstitutional) (emphasis added).

Accordingly, we conclude that this Court lacks the requisite subject matter jurisdiction to review the judgment of the Board of Health. As stated above, a federal district court has no authority to review final judgments of a state court in judicial proceedings. See, Sandomer,, 1993 WL 254280 (E.D. Pa.). (the court held that it lacked subject-matter jurisdiction over the plaintiff's section 1983 claim against the defendant state agency). Thus, we will dismiss Count III of the plaintiffs' complaint without prejudice.

CONCLUSION

In light of the foregoing analysis, defendants' motion for summary judgment will be granted on both Counts I and II of the complaint. Count III will be dismissed without prejudice for the reasons discussed above.

IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PENNSYLVANIA CIVIL DIVISION - LAW

RICHARD DENNIS and PENELOPE DENNIS,	:
Plaintiffs,	:
v.	:No.
	:1999-C-2144
CITY OF EASTON and EASTON BOARD OF HEALTH,	:
Defendants.	:

PLAINTIFFS' AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA :

SS:

COUNTY OF LEHIGH :

I, Penelope Dennis, being duly sworn according to law, depose and say as follows:

PROCEDURAL HISTORY

1.On May 17, 1994, the Defendants changed my lifend the life of my spouse forever.

2.On May 17, 1994, Edward Ferraro, acting as a City Sanitarian, came to Penny's Store, posted it and ordered it closed for business.

3.The Order of may 17, 1994, was done without any prior court order, and solely in the discretion of Edward Ferraro, acting as an agent for the City of Easton.

4.Since the Order of May 17, 1994, I have made three separate distinct attempts to get the Order of May 17, 1994, reviewed by a fair and neutral judicial forum, and I have never had the opportunity of a court ruling on the facts of this case.

5.After the closure on May 17, 1994, I timely filed an appeal from the ex parte order closing Penny's Store.

6.When I arrived at the hearing scheduled for 7:30 P.M., with my lawyer and our witnesses, we are advised that our hearing would be delayed, and that no stenographic record would be made of the proceeding.

7.I was accompanied by six (6) persons who were not from the Dennis family and were identified as witnesses who wanted our family to keep the store open.

8. Prior to the closure, there was no Inspection Report which caused the Sanitarian to close Penny's Store.

9. The only Inspection Report that our family had was the one dated December 11, 1991, and there was nothing in that report about closing the store, or even suggesting that there was any reason for closing down the store.

10. After a two hour wait, the hearing finally began at about 9:30 P.M. and all of our witnesses patiently waited for their turn to testify.

11. At the hearing, we were provided with a packet of exhibits, and the only official Inspection was the old stale inspection from December 11, 1991.

12. Edward Ferraro testified that he had "voluminous notes" showing subsequent inspections after December 11, 1991, but he did not bring them with him.

13. The December 11, 1991, Inspection Report was old and obsolete in that it related to the operation of Penny's Store as a "deli", and the deli was closed long before the May 17, 1994, shutdown.

14. My lawyer advised the Board that we had six independent witnesses who wished to be heard about the condition of the store, but the Board voted by a 3-1 vote not to permit the six independent witnesses to testify.

15. There was a patent bias against me and my family at the hearing on June 30, 1994. First, there was no Official Inspection Report relating to the Order to close the store. Second, Edward Ferraro testified that he had "voluminous notes" about inspections after the December 11, 1991, inspection , but they were not being provided. Third, the Board voted 3-1 against permitting our independent witnesses to testify about the condition of the store. Fourth, there was no stenographic record being made, and the board was going to close them out using the "undisclosed secret

voluminous" notes of subsequent investigations. At that point, it was obvious to me and my family that we were not getting a fair hearing.

16. After this unfair, unrecorded hearing of June 30, 1994, I began my campaign to get a court to review the closure, and to date, no court has ever ruled that the Order of May 17, 1994, was proper.

17. On July 25, 1994, I timely filed a Complaint at 1994-C-5915 asking the Court to review the Order of closure of May 17, 1994, which was affirmed by the Easton Board of Health on June 30, 1994. A copy of the docket entries from 1994-C-5915 is attached as Exhibit A.

18. Instead of having the Court of Common Pleas of Northampton County hear my case, the Defendants transferred the action to Federal Court.

19. On January 22, 1996, the Federal Court dismisses my Federal claims concerning pre-hearing constitutional deprivation, and explicitly held that my state law claim of

improper closure must be heard in state court. See, copy of docket entries in Federal Court attached as Exhibit B, and a copy of Federal Court opinion attached as Exhibit C.

20. Given this Federal determination, I timely filed a second action in State Court on February 20, 1996, again seeking a hearing under State law reviewing the Order of May 17, 1994, closing my store. A copy of said docket entries are attached hereto as Exhibit D.

21. On May 15, 1997, the trial court, per Freedberg, J. agreed that I was never given a hearing on the merits concerning the closure, and the court specifically ordered that the matter be remanded back to the Easton Board of Health for a "full and complete record" to determine whether or not the closure of May 17, 1994, was arbitrary and capricious.

22. Despite the clear and unambiguous Order of Judge Freedberg of May 14, 1997, the Defendants intentionally failed to doing anything from May 14, 1997, until March 3, 1999.

23. In other words, for about 654 days after Judge Freedberg ordered a remand, the Defendants did not schedule a hearing.

24. On March 3, 1999, the Defendant finally met for a hearing at which time I appeared with my spouse and our lawyer to get the hearing concerning the arbitrary and capricious closure of our store on May 17, 1994.

25. In other words, after about 1,746 days after the government closed our store, we were finally going to hear before a court stenographer the evidence as to why the government took our store away from us.

26. Instead of giving us the hearing ordered by Judge Freedberg, the Defendants established that we lost Penny's Corner Store by an involuntary transfer, and that as of October 30, 1998, the realty was no longer owned by us. A copy of the hearing on March 3, 1999, is attached hereto as Exhibit E, and the adjudication claiming that we did not have

"standing" to contest the closure is attached hereto as Exhibit F.

27. It is true that we involuntarily lost the realty known as Penny's Corner Store, and that as of October 30, 1998, the record owners were Richard and Barbara Young.

28. It is equally true that, if the Defendants did not arbitrarily and capriciously close the store on May 17, 1994, we would have maintained our cash flow of about $500,000.00 a year, and we would have not lost the store.

29. We lost the store solely and exclusively because of the Order of May 17, 1994, and no court has ever ruled that the closure was proper, even though Judge Freedberg explicitly ruled on May 14, 1997, that we were entitled to a hearing on this issue.

30. The government took away our store—took away our livelihood—and caused us to lose our realty and home—and now the government says it is OK because it happened so long ago and our store was not really worth anything.

31. Just so the record is clear, the realty known as Penny's Corner was not just our store, but was also our home where we lived, and where we raised our children.

32. Penny's Corner Store was how I chose to live my life, and but for the Order of May 17, 1994, I would have continued operating it until my dying days.

33. Defendants attach piles of papers to the Motion for Summary Judgment attempting to create the illusion that the Order of may 17, 1994, was justified. Here is the truth about Penny's corner Store, and its closure on May 17, 1994.

FACTS OF CLOSURE

34. I operated Penny's Corner Store since September 18, 1970, and the store is named "Penny's" because of my name, Penelope.

35. The building is an older "double-house" which was converted into a store/house before my husband and I purchased it.

36. The building is located in a working class neighborhood in the West ward of Easton, and was operated from 1970 to 1987 solely as a "Mom & Pop" convenience store.

37. In 1988, I added a "deli" to the store, and with both the deli and the convenience store, Penny's was grossing in excess of $1,000,000.00 per year.

38. Without the "deli", we were grossing in excess of $500,000.00.

39. The "deli" sales were never more than 40% of our business, and it was becoming more and more obvious to me that the profitability of the store did not depend upon the deli, and in fact, the convenience store was probably subsidizing the "deli" operation.

40. The reason that the "deli" business was not profitable was because it was so labor intensive. As a "Mom & Pop" store, my family and I could operate the store with

part-time help, and we never had more than 4 part-time employees.

41. Once we added the deli, the business became very labor intensive, and the payroll skyrocketed, and there were years that we had more than 20 part-time employees.

42. The Health Department never complained about the "Mom & Pop" operation, and the complaints solely related to the deli, for instance, "stove in deli cannot be used - not of a commercial type," –OR— "employees in food prep area to ware (sic) hair restraints" –OR— "organize and clean inside walkin (sic) refrigerator: etc. See, formal inspection report of December 20, 1991, attached as Exhibit B to Affidavit of Loretta M. Dennis in Federal Action.

43. I was present on December 14, 1993, when Defendant's agent, Edward J. Ferraro, hand delivered a letter claiming that Penny's Corner Store had unspecified violations, but Edward Ferraro did not deliver the letter to me, or engage in any discussion with me about the purported

problems. Instead, he handed the letter to my husband who was working in the convenience store with y daughter while I was working in the deli area. See, Plaintiffs' Exhibit A to Loretta Dennis affidavit in Federal Action.

44. When Defendant's agent, Edward J. Ferraro, appeared on December 14, 1993, he did not even come into the deli area, and he never passes the counter area of the convenience store where my husband and daughter were standing by the cash register. Certainly, Defendant, Ferraro, did no inspect the premises, and he did not provide any type of itemized list of defects. Defendant's agent, Ferraro, handed my husband the letter, and my husband told me about it.

45. In my many years of operation, I participated in annual inspections with the City of Easton, and the Pennsylvania Department of Agriculture. I knew from actual experience that the City of Eaton used a "Report of Inspection" form similar to the one that was used on

December 11, 1991, which is attached hereto as Exhibit B to Loretta Dennis Affidavit in Federal Action.

46. The letter of December 14, 1993 (Loretta Dennis Affidavit's Exhibit A in Federal Action) was patently false, namely, there were no Health Code violations, there was no official or unofficial inspections, and neither Edward Ferraro nor anyone else from the City of Easton ever gave us written notice of any alleged violations. Our last official inspection by the City of Easton was December 11, 1991, and we passed. The Pennsylvania Department of Agriculture approved the store in an inspection on February 4, 1993. See, Loretta Dennis Affidavit, Exhibit L in Federal Action.

47. The letter of December 14, 1993 was odd. There was no inspection. There was no list of violations. The Defendant's agent, Ferraro, was making claims of violations, but was not giving us any guidance as to what he wanted changed.

48. Because of this odd letter, my daughter, Loretta, telephoned the Mayor's Office to arrange a meeting to get to the bottom of Ferraro's false claims of violations.

49. At my daughter's request, there was a meeting the morning of December 16, 1993, where the following persons attended:

PENNY'S CORNER STORE: Loretta Dennis attended with her father, Richard Dennis;

CITY OF EASTON: Mayor Thomas Goldsmith, Edward Ferraro, City Sanitarian; Theresa Hogan, Assistant Solicitor; Alvin Fairchild, City Safety Director; and a secretary from the Health Office.

I could not attend the meeting because the Christmas season was extremely busy, and I was filling orders at the deli for Christmas parties.

50. My daughter and husband came back from the meeting well pleased with the results. We were going to get to the bottom of the false claim of unspecified violations.

Mayor Thomas Goldsmith was explicit, namely, Edward Ferraro was ordered by the Mayor to do an official inspection, and give us a written report of any violations and a list of proposed corrective action. That was all right by me. Edward Ferraro could come to my store anytime and inspect it. It was always clean. In over 20 years of operation, no one ever became sick from food prepared or purchased from Penny's.

51. I had received letters of thanks for our food preparation service from former Mayor Sal Panto, current Mayor Thomas Goldsmith, Chamber of Commerce, Warren Hospital Association, U.S. Postal Service, Federal Aviation Association, and numerous others.

52. At the meeting with the mayor, my daughter volunteered to mayor Goldsmith that it was our intention to stop operating the delicatessen after the Christmas season anyway. My daughter always believed that I was working too hard, and she wanted me out of the deli business because

she thought it was too demanding for the type of financial return that I was getting from the deli. My daughter wanted me to concentrate solely on the convenience store selling non-food items and food items pre-packaged by the food processors, which is exactly the way the store was run very profitably from 1970 to 1988.

53. The reason my daughter picked after Christmas for shutting the deli was because she knew that I already had numerous commitments for party trays for the Christmas season, and I was very proud of the popularity of my Christmas trays. It would have broken my heart to disappoint so many of my faithful and loyal customers.

54. My daughter, Loretta, was the one who kept pushing me to stop the deli business because of the intensive labor that I put into the party trays. My daughter kept telling me that the delicatessen was causing the financial problems with Penny's Corner Store. It was her business judgment that the store could be made profitable by eliminating the deli

operation, and concentrating solely on pre-packaged goods just as we had done for years before the deli operation.

55. On the afternoon of December 16, 1993, Defendant's agent, Edward Ferraro, again appeared at the store as ordered by the Mayor, and gave my daughter a letter demanding that we permit an immediate inspection of the store. Again, that letter was odd. That was exactly what the morning meeting of December 16, 1993, with Mayor Goldsmith accomplished. We wanted the inspection. We wanted to know what the purported problem was. It was my daughter's insistence that we get a formal inspection to know what Mr. Ferraro's letter of December 14, 1993, was talking about. The letter closed with the warning that, if we did not permit the inspection, "...the entire business operation shall cease." See, letter dated December 16, 1993, attached as Loretta Dennis Affidavit's Exhibit C in Federal Action. Again, this was odd. We wanted the inspection, and he was acting as if we were interfering with his ability to inspect. I

was there on the afternoon of December 16, 1993. Mr. Ferraro was free to inspect as thoroughly as he wished. Mr. Ferraro chose not to inspect.

56. The Defendant's agent, Edward Ferraro, was inside the building on December 16, 1993. He was demanding an inspection. No one stopped him from inspecting the business on December 16, 1993. The Defendant's agent, Edward Ferraro, made the choice on December 16, 11993, not to inspect the premises, even though ordered by the Mayor to do so, and even though we wanted the inspection to clear our good name.

57. Instead of inspecting the premises, Defendant's agent Ferraro, made certain "verbal" observations about how we should operate the delicatessen between December 17, 1993 and January 1, 1994. Remember, my daughter already told Mayor Goldsmith and Defendant's agent, Edward Ferraro, that we were going to close the delicatessen only, as of January 1, 1994.

58. The bottom part of the letter read as follows:

"At 5:00 P.M. on January 1, 1994, the entire business operation shall cease and not re-open until you have fully complied with all applicable codes and all required permits have been issued."

When Ferraro gave my daughter this letter with this concluding paragraph, my daughter explicitly pointed out to him that the wording was contrary to the arrangement concluded that morning in the Mayor's Office. She explicitly told Mayor Goldsmith and Edward Ferraro that we were only closing the delicatessen on January 1, 1994, not the entire business. The Mayor further told my daughter and husband that Mr. Ferraro was supposed to inspect the premises as recited at paragraph No. 1 of the letter so we would know exactly what non-delicatessen repairs were required. At first, my daughter refused to sign the letter. Then, Mr. Ferraro advised us that her observations were correct, and that the closing referred only to the entire delicatessen operation, not

the entire operation. Hence, my daughter signed the letter with the understanding that the inspection would be done, and that we were voluntarily closing the deli for our own reasons, not because of any health violations.

59. Because Defendant's agent, Ferraro, did not give us a written inspection report on December 16, 1993, as ordered by the Mayor, my daughter was suspicious. She said that there was something weird going on. The meeting was only that morning. Edward Ferraro was there. How could he forget what the Mayor ordered him to do. My daughter took it upon herself to list Ferraro's verbal suggestions in a letter to the City of Easton dated December 17, 1993, to avoid any misunderstanding.

60. the five suggestions verbally made by Defendant's agent, Ferraro, on December 16, 1993, and reduced to writing by my daughter in my letter of December 17, 1993, were scrupulously followed.

61. Despite the Mayor's order for an immediate inspection, and despite Ferraro's demand that Penny's Corner Store "...submit to an immediate inspection to determine all violations concerning minimum critical health code requirements...", no inspection took place between December 16, 1993, and January 1, 1994. Se, Loretta Dennis Affidavit's Exhibit C in Federal Action.

62. On Sunday, January 1, 1994, I closed the delicatessen, as promised, and put a partition wall closing off the area where the delicatessen workers used to work. The deli was closed because my daughter convinced me that it was a financial drain. There was never any health reason for closing the deli.

63. The meeting with Mayor Goldsmith was clear, namely, there was to be a formal inspection by Defendant's agent, Ferraro. The letter of December 16, 1993 (Loretta Dennis Affidavit's Exhibit C in Federal Action), was clear, namely we were to permit an "immediate inspection".

Defendant's agent, Ferraro, however, was not inspecting the store.

64. Because Defendant's agent, Ferraro, was not inspecting the store, my daughter started telephoning him asking when he was going to appear and advise us of the status of our modified operation now that the delicatessen was closed. She telephoned several times trying to arrange an appointment.

65. On Tuesday, January 11, 1994, Defendant's agent, Ferraro, finally appeared at the store. His appearance was very brief, and lasted less than 15 minutes. It almost appeared that he did not understand the prior meeting of December 16, 1993. We were not immediately interested in opening up the delicatessen at that point in time. We were supposed to get back to the City with a proposal for re-opening the deli, if we decided to re-open it. Otherwise, Mr. Ferraro indicated everything was just fine with the convenience store. He was only interest in telling us what we

had to do to re-open the delicatessen, and we had no immediate plans to re-open the delicatessen. See, Ferraro's note book entry of Tuesday, January 11, 1994, attached as Loretta Dennis Affidavit's Exhibit E in Federal Action.

66. On January 26, 1994, Defendant's agent, Ferraro, sent us another letter claiming that he made an "inspection" on January 12, 1994. Ferraro's only appearance was on January 11, 1994, and he gave us vague verbal instructions as to what must be accomplished to re-open the deli. As indicated, re-opening the deli was our goal. My daughter wanted me out of the deli business. It was closed on January 1, 1994. Our immediate goal was to concentrate on the "Mom & Pop" convenience store.

67. In response to Ferraro's letter of January 26, 1994, my husband wrote a letter dated January 31, 1994, indicating that we did not have estimates for work to be done to re-open the deli because of the inclement weather, and that "we will be making a decision shortly" about whether or not

we wanted to re-open the delicatessen. See, Loretta Dennis Affidavit's Exhibit G in Federal Action. According to the time-stamped copy from the City of Easton, the letter was received on February 4, 1994.

68. Prior to receiving my husband's letter date February 1, 1994, saying that he will be closing the entire operation as of February 4, 1994. See, Loretta Dennis Affidavit's Exhibit H and Defendants' Exhibit Q.

69. Prior to February 1, 1994, the City only identified the deli operation as the source of any potential problem, and the City accepted our solution of closing down the delicatessen until repairs could be made IF we wanted to operate a deli. The letter of February 1, 1994, was the first time anyone indicated that operation of the convenience store, without a deli, might also be a problem.

70. The letter of February 1, 1994, caught all of us completely off guard. The December 16, 1993 letter (Loretta Dennis Affidavit's Exhibit C), said there was supposed to be

an inspection. There was still no inspection. No one from the city ever made any complaint about the convenience store operation. I did not understand what was happening. **Why was the City of Easton now for the first time talking about closing down the convenience store?**

71. Lurking in the background was the fact that Alan Asteak, and his wife, Dr. Hildy Strongwater Asteak, had personally visited the store in the summer of 1993 to discuss with my husband the prospect of buying the store. Alan's father and mother lived across the street (1152 Bushkill Street, Easton, PA), and Alan had grown up in the neighborhood. Alan had a very insecure job at the Easton Sewage Treatment Plant, and he came into the store in the Summer of 1993 with his wife to inspect it, and to discuss purchasing it.

72. The discussions about purchasing the store were serious and substantial discussions. Alan Asteak and his family were well aware of the volume of business that was

conducted from the store. People were always coming and going, and they could personally see it. The discussions began by Alan Asteak going to our lawyer, Nathan Reibman. From our perspective, Alan Asteak was acting like a very serious buyer.

73. It is interesting to note that the entire impetus for this matter came from a letter dated October 8, 1993, from Paul L. Singley, Chief Code Administrator. Alan's father, Marvin Asteak worked as a Code Enforcement Officer for the City of Easton. Alan's mother, Doris Asteak, was a member of the Easton Board of Health.

74. The letter of February 1, 1994, aroused my husband's suspicion that this was not about code violations, or health code violations, but the Asteak's desire to purchase the business. See, deposition of Nathan Reibman attached hereto as Exhibit G.

75. On February 4, 1994, I attended a meeting as follows:

PENNY'S CORNER STORE: my husband, my daughter Loretta Dennis, Attorney Keene Jabbour and I.

CITY OF EASTON: Edward Ferraro, Alvin Fairchild and a secretary.

76. At the meeting of February 4, 1994, the entire thrust of the meeting was the repairs that were supposed to be made to re-open the deli. Both Fairchild and Ferraro wanted to see plans from builders about renovating the building to re-open the deli. We told them we might not re-open the deli because we were not necessarily interested in the deli operation. Hence, at the meeting, it was expressly agreed that we were not going to re-open the deli unless we make structural repairs to the building.

77. On or after February 4, 1994, we received two mailings from the City of Easton:

a. Letter from Ferraro telling us that the deli must remain closed. (Loretta Dennis Affidavit's Exhibit I in Federal Action.).

b. Letter from Ferraro telling us how to renew our Health License for operation of convenience store. Loretta Dennis Affidavit's Exhibit J in Federal Action.

78. Note that the letter of February 4, 1994, appears to incorporate the last official inspection of December 11, 1991. In the last official report, Defendant's agent, Ferraro, approved us. See, Loretta Dennis Affidavit's Exhibit B in Federal Action.

79. In the letter of February 4, 1994, Defendant's agent, Ferraro, asked us to resubmit the application for license, and the application was returned to him and approved by him on page 4 where Ferraro signed off. See, Loretta Dennis Affidavit's Exhibit K, and check for $100.00 dated January 27, 1994 in Federal Action.

80. From our perspective, we did everything that the City of Easton asked, namely, we voluntarily closed down the deli on January 1, 1994, and kept it closed; and we paid the

$100.00 licensing fee to operate in 1994 and Defendant's agent, Ferraro signed off on our application.

81. The simple reality is that the last official inspection was December 11, 1991, and Defendant's agent, Ferraro, approved our application at that time. The Mayor of the City of Easton ordered Ferraro to give us a complete inspection and written report on December 16, 1993, and Defendant's agent, Ferraro, never did so. On February 4, 1994, Defendant's agent, Ferraro, asked to resubmit for our business license, and we did so, and the City accepted our check for $100.00.

82. Between January 11, 1994, and may 17, 1994, Defendant's agent, Ferraro, never set foot inside the store, and never made the official inspection or report thereof, that he was ordered to make by Mayor Goldsmith on December 16, 1993.

83. Penny's Corner Store was subject to inspection by the City of Easton and the Pennsylvania Department of

Agriculture, and was never notified that it ever failed an inspection. See, last official from Pennsylvania Department of Agriculture February 4, 1993, approving our operation while we were operating as a deli-convenience store which is attached as Exhibit L to Loretta Dennis Affidavit in Federal Action.

84. On May 17, 1994, at about 4:55 P.M., without any hearing, and without any official inspection report, the Defendant's agent, Ferraro, put a placard on our door closing us down immediately.

85. I attended a hearing on June 30, 1994, along with my husband and daughter, and six neighbors who wanted to testify about the conditions of the store.

86. The Board of Health refused to listen to the testimony of the six witnesses who voluntarily appeared to testify about the condition of the store, with one member dissenting, namely, Robert Silberman, M.D. How could the Board of Health closed my store without a hearing? The

hearing was held 44 days later, and scheduled for 7:30 P.M. The Board then kept us waiting for two hours before the hearing actually began. Our six witnesses waited patiently. Then, after Ed Ferraro's testimony, when our witnesses wanted to testify, the Board ruled 3-1 that our witnesses could not be heard.

87. Doris Asteak participated in the formal decision to close the store, and specifically indicated that the building was shaded by trees and shrubbery growing outside, and she did not think a grocery store should have trees outside the building. That was her only objection, namely, the trees growing outside the store.

88. The Board of Health is a five person board. One, Robert Silberman, M.D., voted against the motion to shut us down. The other, M. James Dervin, Chair of the Board was absent because of illness. The vote was 3-1

89. We were never given notice of the repairs, and the Easton Board of Health even refused to hear our witnesses.

90. The plain simple truth is that the Defendant's agent, Ferraro, was not in the store between January 12, 1994, and May 16, 1994. The last time he inspected the store was on December 11, 1991.

91. After the closure, numerous former customers have approached me and told me that they wanted to testify to help me. Because of these numerous inquiries, I distributed an affidavit form to them so they could tell the court exactly the condition of the store. I generated 91 affidavits by customers, and their very favorable comments are in stark contrast to the false claims by Edward Ferraro. The 91 customer affidavits were filed in the Federal Action.

92. By way of illustration only, I would direct the Court's attention to the affidavit of Dr. John Marone, a Professor of Anthropology at Lafayette College, who volunteered the following observations:

"Overall—very clean. Many times I saw employees cleaning the facility (which was far cleaner than

many currently open in Easton). ONE SHOULD NOT CONFUSE A FACILITY'S BEING OLD WITH CLEANLINESS.

CLEAN. ONE OF THE MAIN REASONS I SHOPPED AT PENNY'S WAS FOR THE DELI PRODUCTS—FRESHLY MADE & OF HIGH QUALITY. FAR FRESHER AND SUPERIOR TO SUPERMARKET OR CONVENIENCE STORE DELI/REFRIGERATION SECTIONS.

Wonderful basics that I used almost daily. Fine quality. I miss it! Were it not clean & fresh, I wouldn't feed it to friends and family. Much fresher than supermarket food.

The facility was always clean, the food and beverages were always fresh. The employees were clean and courteous and the owners were personable and honest. This era of indifference, coldness & mediocrity is what makes such a small American family corner store something to be

cherished. Note: I was shocked and baffled when the store was closed."

93. The customer affidavits really do tell the plain simple truth, namely, the store was always clear and well stocked, the aisles free and uncluttered, the items that need refrigeration were refrigerated properly, and the shelves were repainted and walls wallpapered. Not a single person ever made a claim that a purchase from the store ever made them ill. Numerous prominent personalities in the Easton area shopped in the store, including Senator Jeanette Reibman., State Representative Robert Freeman, Ms. Joann Goldsmith, wife of Mayor Thomas Goldsmith, Professor John Marone of Lafayette College, Rabbi Mark Schrager, Dr. Robert Silberman, a member of the Board of Health who voted against the closure, Professor Charles Staples of Lafayette College, Dr. Robert Moll of Easton Area High School, Dr. Peter Cooper, an obstetrician, Attorney Frank Poswistilo, Attorney Jerry Brose, Attorney Diane Elliot, Attorney

Charles Elliot, Rev. Larry Lindenmuth, Rev. Gordon Furbay, Attorney Herbert Litvin, Attorney Phil Lauer, Attorney Gary Asteak, Councilwoman Carol Weaver, Councilman Brian Ahearn, Councilman William Kiefer, Donna Mulholland, President of Easton Hospital, Earl Wismer, a member of the Board of Directors of Easton Hospital and too many others to o numerous to mention. Obviously, you cannot gross a million dollars a year in a working class neighborhood unless there is substantial community support.

94. There was no basis for closing down the store.

95. I had far more than 91 customers who signed affidavits. If, however, only the 91 customers who signed affidavits stayed as regular customers of our "Mom & Pop" operation, I could have operated the store successfully.

SUING BECAUSE WE LOST THE STORE

96. The Defendants take the position that, because we lost the store, our case should be dismissed.

97. My perspective is just the opposite, namely, because we lost the store—because we were never given a hearing on the merits before a court stenographer—because the Defendants waited until March 3, 1999, to give us a hearing ordered by Judge Freedberg on May 15, 1997—we ought to be compensated for our loss.

98. We lost everything because Edward Ferraro came in May 17, 1994, and slapped a "Closed By Order Of Health Board" sign on our store, and no court has ever ruled on the merits of that closure.

99. We should be able to sue because we lost our store, our home, and our livelihood, and no court has ever found it was done properly. From my perspective, our property was taken away from us without due process of law.

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Penelope M. Dennis